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5 Attorneys for Plaintiffs
NATIONAL PUBLIC RADIO, INC. and INA JAFFE

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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10

11 NATIONAL PUBLIC RADIO, INC. and
INA JAFFE,

12 Plaintiffs,

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14 v.

15 CENTERS FOR MEDICARE AND
MEDICAID SERVICES; U.S.
16 DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

17 Defendants.
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Case No. 19-cv-8872

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF FOR
VIOLATION OF THE FREEDOM
OF INFORMATION ACT, 5 U.S.C.
§ 552 et seq.**

DAVIS WRIGHT TREMAINE LLP

1 Plaintiffs National Public Radio, Inc. and Ina Jaffe (collectively, “NPR”), by
2 their undersigned attorneys, allege as follows:

3 **INTRODUCTION**

4 1. NPR brings this action under the Freedom of Information Act, 5 U.S.C.
5 § 552 *et seq.*, as amended (“FOIA”), to enjoin the Centers for Medicare and
6 Medicaid Services and the U.S. Department of Health and Human Services from
7 continuing to improperly withhold agency records on antipsychotic drug use and the
8 names of corporate nursing home chains that the CMS has identified as using
9 antipsychotic medication at high rates at some 1,500 nursing homes across the
10 nation. NPR also has been denied access to electronic data maintained by the CMS
11 on the diagnoses of schizophrenia by each Medicare certified skilled nursing facility
12 in the nation. The information being withheld by the CMS will significantly
13 contribute to the public’s understanding of the levels of schizophrenia in Medicare
14 certified skilled nursing facilities in the nation and also shed light on how the
15 government oversees the use of antipsychotics drugs in nursing homes, including the
16 CMS “National Partnership to Improve Dementia Care in Nursing Homes,”
17 affecting over a million patients.

18 2. The Freedom of Information Act “focuses on the citizens’ right to be
19 informed about ‘what their government is up to,’” by requiring the release of
20 “[o]fficial information that sheds light on an agency’s performance of its statutory
21 duties.” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750, 773
22 (1989) (citation omitted). “[D]isclosure, not secrecy, is the dominant objective” of
23 FOIA. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8,
24 (2001) (internal quotation marks and citations omitted). NPR plays a critical role in
25 providing information to citizens about “what their government is up to.” Indeed,
26 the First Amendment’s guarantee of freedom of the press is meant to enable
27 journalists to play an “essential role in our democracy,” to “bare the secrets of
28

1 government and inform the people.” *New York Times. Co. v. United States*, 403 U.S.
2 713, 717 (1971) (Black, J. concurring).

3 3. Through its FOIA requests, NPR seeks to fulfill its journalistic function
4 and to shine a public light on activity of these federal agencies who are responsible
5 for the administration of health care services for tens of millions of Americans.

6 **PARTIES**

7 4. Plaintiff National Public Radio, Inc. is a non-profit multimedia
8 organization and the leading provider of non-commercial news, information, and
9 entertainment programming to the American public. NPR’s fact-based, independent
10 journalism helps the public stay on top of breaking news, follow the most critical
11 stories of the day, and track complex issues over the long term. NPR reaches
12 approximately 105 million people on broadcast radio, podcasts, and NPR.org per
13 month. NPR distributes its radio broadcasts through more than 1,000 non-
14 commercial, independently operated radio stations, licensed to more than 260 NPR
15 members and numerous other NPR-affiliated entities.

16 5. Plaintiff Ina Jaffe is a resident and citizen of the state of California and
17 a journalist who works as a Correspondent on NPR’s National Desk from an office
18 in Culver City, California.

19 6. Defendant Centers for Medicare and Medicaid Services (“CMS”) is a
20 component of Defendant U.S. Department of Health and Human Services (“HHS”),
21 itself a component of the Executive Branch of the United States Government.
22 Defendants are each an “agency” within the meaning of 5 U.S.C. § 552(f). Plaintiffs
23 are informed and believe that the CMS has possession and control of the records
24 sought by the requests.

25 **JURISDICTION**

26 7. This Court has subject-matter jurisdiction over this action and personal
27 jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 701-706, and
28 28 U.S.C. § 1331.

1 **VENUE**

2 8. Venue in the Central District of California is proper under 5 U.S.C.
3 § 552(a)(4)(B) as Ms. Jaffe's work for NPR and her Requests to the CMS occurred
4 in Los Angeles County. For the same reason, venue also is proper under 28 U.S.C.
5 § 1391(e).

6 **FACTS**

7 9. Through a FOIA request sent by Ms. Jaffe on behalf of NPR on March
8 25, 2019, Ms. Jaffe requested access to certain documents that related to a CMS
9 memo dated March 1, 2019. [https://www.cms.gov/Medicare/Provider-Enrollment-](https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/QSO19-07-NH.pdf)
10 [and-Certification/SurveyCertificationGenInfo/Downloads/QSO19-07-NH.pdf](https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/QSO19-07-NH.pdf). The
11 CMS memo refers to approximately 1,500 nursing homes that the agency calls "late
12 adopters," that CMS describes as "facilities that had not improved their
13 antipsychotic medication utilization rates for long-stay nursing home residents since
14 2011Q4 and had high rates of usage." In a March 25, 2019 request, Ms. Jaffe
15 requested a list of those facilities and their locations – and CMS provided this
16 information to NPR. The March 1, 2019 memo also states, "CMS is also looking
17 for opportunities to engage with corporate chains that have significant numbers of
18 nursing homes identified as late adopters." Based on this representation by CMS, as
19 part of her March 25, 2019 request, Ms. Jaffe also requested that CMS produce
20 documents that identify the corporate chains who own nursing homes identified by
21 CMS as "late adopters." Attached as Exhibit A is a copy of the request. Through a
22 second FOIA request also made on March 25, 2019, Ms. Jaffe also requested a copy
23 of the December 2017 "Notification document" (also referenced in the March 1,
24 2019 memo) sent to corporate chains with large numbers of late adopter nursing
25 homes. The request also asked for any correspondence from individual nursing
26 homes or corporate chains in response to these notifications, as well as CMS replies.
27 Attached as Exhibit B is a copy of the request.

10. On March 26, 2019, through a third FOIA request sent by Ms. Jaffe on behalf of NPR, Ms. Jaffe requested access to “Federal Minimum Data Set (MDS) facility specific data on diagnoses of schizophrenia (160000) by each Medicare certified skilled nursing facility in each of the 50 states and the District of Columbia for Q4 2011 and for Q3 2018.” Ms. Jaffe requested access to this data in “user-friendly spreadsheet formats for each of these dates. Attached as Exhibit C is a copy of the request.

11. Also on March 26, 2019, through a fourth FOIA request sent by Ms. Jaffe on behalf of NPR, Ms. Jaffe requested access to “Federal Minimum Data Set (MDS) facility specific data on antipsychotic drug use NQ410A by each Medicare certified skilled nursing facility and Medicaid certified skilled nursing facility in each of the 50 states and the District of Columbia for Q4 2011 and for Q3 2018.” Attached as Exhibit D is a copy of the request.

12. In all four of the FOIA requests, Ms. Jaffe also asked the CMS for a “waiver of all fees for this request.”

13. In separate letters dated March 27, 2019 and April 9, 2019, the CMS acknowledged receipt of the March 26, 2019 FOIA requests. Attached as Exhibit E is a copy of this correspondence.

14. In a May 20, 2019 response to Ms. Jaffe’s March 25, 2019 request, CMS stated that “After a careful search of the Centers for Medicare & Medicaid Services (CMS) files, i.e., a search reasonably calculated to locate records responsive to your request and employing reasonable standards, we were unable to locate any records.” Attached as Exhibit F is a copy of this correspondence.

15. On July 9, 2019, Ms. Jaffe appealed the CMS’s response to the March 25, 2019 FOIA request. Ms. Jaffe wrote: “It makes no sense that CMS says it is reaching out to work with corporate chains with large numbers of late adopter nursing homes and simultaneously says there are no documents that identify the chains that CMS is contacting.” Attached as Exhibit G is a copy of the appeal. In

1 an August 13, 2019 letter, Hugh Gilmore, Director of CMS's Freedom of
2 Information Group acknowledged receipt of this appeal. Attached as Exhibit H is a
3 copy of this correspondence. CMS has otherwise not responded to this appeal.

4 16. As of the filing of this Complaint, over six months has elapsed since
5 NPR made its FOIA requests to the CMS. Because the CMS's response to the
6 March 25, 2019 FOIA request is clearly mistaken and the agency has entirely failed
7 to respond to NPR's March 26, 2019 FOIA requests, Plaintiffs are deemed to have
8 exhausted their administrative remedies with respect to the requests under 5 U.S.C.
9 § 552(a)(6)(C)(i).

10 **FIRST CAUSE OF ACTION**

11 **(Violation of FOIA)**

12 17. The CMS and HHS have a legal duty under FOIA to determine whether
13 to comply with a request within 20 days after receiving the request, and also has a
14 legal duty to immediately notify the requester of the agency's determination and the
15 reasons therefore. Plaintiffs have a legal right under FOIA to obtain the agency
16 records they requested in their request, and there exists no legal basis for the CMS's
17 failure to respond to Plaintiffs' FOIA requests and to make these records available
18 to NPR.

19 18. The CMS and HHS's failure to make promptly available the records
20 sought by Plaintiffs' requests violates FOIA, 5 U.S.C. § 552(a)(3)(A) and
21 (a)(6)(A)(ii), and applicable regulations promulgated thereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the Court award them the following relief:

- A. Declare that the CMS and HHS violated FOIA in their response to NPR's FOIA requests;
- B. Order the CMS and HHS to immediately disclose the requested records to Plaintiffs and enter an injunction prohibiting the CMS and HHS from continuing to withhold the requested records;
- C. Order the CMS and HHS to immediately disclose any responsive records in its possession to Plaintiffs;
- D. Award Plaintiffs their reasonable costs and attorney's fees;
- E. Grant such further relief as the court may deem just and proper.

Dated: October 15, 2019

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Thomas R. Burke
THOMAS R. BURKE

Attorneys for Plaintiffs
NATIONAL PUBLIC RADIO, INC. and
INA JAFFE